No. 82-53

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CRAIG MCCARTHY,

Plaintiff-Petitioner,

—v.—

THE BARK PEKING, her Sails, Equipment, Appurtenances, etc., and SOUTH STREET SEAPORT MUSEUM,

Defendants-Respondents and Third-Party Plaintiffs,

—v.—

THE STATE INSURANCE FUND and NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,

Third-Party Defendants.

BRIEF IN OPPOSITION TO THE PETITION OF CRAIG MCCARTHY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented for Review

Were the courts below correct in holding that petitioner, a maritime museum employee whose duties involved general maintenance work and historic restoration work for the museum and who was injured doing routine painting aboard a museum ship that has not sailed for fifty years, was not engaged in maritime employment within the meaning of § 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3)?

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Citations to the Opinions and Judgments Delivered in the Courts Below

The Opinion and Judgment of the United States Court of Appeals for the Second Circuit is reported at 676 F.2d 42 (1982). The decision of the Court of Appeals, without the concurring opinion, is included as Appendix A in the Petition for Writ of Certiorari. The Opinion of the United States District Court for the Southern District of New York has not been officially reported; it is included as Appendix B to the Petition for Writ of Certiorari.

IN THE

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OCTOBER TERM, 1982

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Plaintiff-Petitioner,

—v.—

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BRIEF IN OPPOSITION TO THE PETITION OF CRAIG MCCARTHY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of the Case

This action was commenced by the filing of a Complaint in the United States District Court for the Southern District of New York on June 9, 1980. Petitioner sought to recover damages, pursuant to § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b), for injuries allegedly sustained on December 12, 1979

while working as an employee of respondent South Street Seaport Museum ("Museum").* As was done below before both the District Court and the Court of Appeals, petitioner omits important facts and attempts to convert ordinary terminology into a vocabulary flavored with maritime references in an attempt at establishing that he had been engaged in maritime employment, all without any references to a joint appendix or the record below as required by Rule 34.1(g) of the Rules of this Court. In the light of these inaccuracies and omissions, respondent feels constrained to offer this statement of the case.

The District Court made certain evidentary findings relative to the Peking that were adopted by the Court of Appeals as being supported by the record. *McCarthy v. Bark Peking, supra,* 676 F.2d at 44. As the courts below found, the Peking has not put to sea under its own power since the 1930s, is incapable of now doing so and in fact is not subject to inspection by the United States Coast Guard. Additionally, there is no dispute that from 1931 to 1974, the Peking served as a floating school for boys in England, with only a brief interruption during World War II when it was used to provide accommodations for Royal Navy engineering petty officers at Chatham dockyard. (J.A. 45a) After the Peking was purchased for the Museum in 1974, it was towed from England to New York by the Dutch tug Utrecht and arrived in New York on July 22, 1975. It was treated by both English and United States customs officials as a floating hulk. (J.A. 45a)

The Peking is not an enrolled or registered vessel and has not been such since its sailing days. (J.A. 46a) Any work that was performed aboard the Peking by respondent was restoration

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* Petitioner also included a count in his Complaint in which he pleaded a private cause of action under § 11(c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c)(1), for an alleged wrongful discharge. The District Court granted respondent summary judgment on this count, the Court of Appeals affirmed and petitioner does not now seek review on this issue.

work "for the sole purpose of restoring Peking as a historically accurate museum exhibit and not for purposes of making Peking fit for a return to traditional maritime navigation and commerce, such as carrying passengers or freight for hire." (J.A. 46a) Contrary to the suggestion found at page 3 of the Petition, there is no "usual ship mortgage" covering the Peking; that portion of the purchase price that was not donated by the foundation that purchased the Peking on behalf of respondent is secured by a security interest under the Uniform Commercial Code. (J.A. 181a, 185a-186a) The individual referred to as a "ship master" at page 4 of the Petition, is in fact not a crew member of the Peking, but simply "a foreman supervising historical restoration work to maintain Peking as a museum artifact." (J.A. 183a-184a)

Although petitioner included "The Bark Peking, her sails, equipment, appurtenances, etc." as a named party in this action, no effort has ever been made by petitioner to proceed against the Peking *in rem*. (*See* J.A. 1a-4a) Thus, the Museum is the sole respondent before this Court. The Museum, a private, non-profit organization (J.A. 42a), was founded in 1967 for the purpose of promoting a major maritime museum, restoring historic architecture and historic ships and reviving the economics of the historic seaport area of New York. (J.A. 166a) Any work performed by the Museum aboard the Peking or other Museum ship artifacts is designed to achieve and maintain historical accuracy and not develop a fleet of navigable vessels.

The Petition mischaracterizes petitioner's position at the Museum by repeatedly stating that he had been a "ship repairman". According to the Complaint (J.A. 6a, ¶ 5) and petitioner's own deposition testimony (J.A. 29)*, petitioner's job title was "historic iron-worker" and his duties generally involved trash clean-up, ticket checking and maintenance work

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* Petitioner's deposition testimony is reproduced in its entirety in the joint appendix below following page 186a. All page references without the letter "a" are to the deposition testimony of petitioner.

about the museum (J.A. 15-19, 30-31) as well as historical restoration work. Indeed, petitioner testified at his deposition that on the very day of his accident his work day began with two hours of garbage pick-up and one hour of sweeping the museum parking lot. (J.A. 47)

On the basis of the facts as developed in the record, including the present status of the Peking, the role of respondent Museum and petitioner's actual duties and responsibilities at the Museum, the courts below found that petitioner was not engaged in maritime employment within the meaning of § 2(3) of the LHWCA, 33 U.S.C. § 902(3). The courts below then held that petitioner's cause of action, if any, was barred by the exclusivity provision of the New York Workmen's Compensation Law, as petitioner had filed for and received compensation benefits under New York law. (*See* Appendix B, 13a)

Rather than limiting the statement of the case to those facts that directly bear on the precise issue of whether he was engaged in maritime employment, petitioner once again as in both courts below attempts to present facts that support his theory of liability that respondent was negligent in supplying manila rope that had not been properly inspected and in failing to supervise petitioner and his co-worker, Geise, in their selection of the line that was used as the gantline. Respondent is reluctant to address the inaccuracies and omissions found in these factual arguments in any detail other than to direct the Court's attention to the facts that petitioner and his co-worker had "carte blanche" to purchase whatever equipment they wished (J.A. 117a), that petitioner participated in and was satisfied with Giese's selection of the gantline (J.A. 41-43) and in fact actually used the gantline on at least two occasions prior to his accident without mishap. (J.A. 45) These facts standing alone undercut any claim of a *Reed* v. *The YAKA*, 373 U.S. 410 (1963), cause of action under § 5(b), 33 U.S.C. § 905(b). *See also Richardson* v. *Norfolk Shipbuilding & Drydock, Corp.*, 621 F.2d 633 (4th Cir. 1980).

Reasons for Denying the Petition for a Writ of Certiorari

Petitioner asserts that a writ of certiorari should be granted because of alleged conflicts between the decision below and the intent of the LHWCA, specifically § 2(3), 33 U.S.C. § 902(3), and decisions of other Circuit Courts of Appeal. It is submitted that no such conflicts exist.

The issue of whether petitioner could maintain an action against his employer necessarily brought into play the extent of coverage under the LHWCA, as petitioner claimed to have sued under § 5(b) of the LHWCA, 33 U.S.C. § 905(b). Such a suit cannot be maintained under the New York Workmen's Compensation Law. *O'Rourke* v. *Long*, 41 N.Y.2d 219, 391 N.Y.S.2d 553 (1976).

In granting respondent summary judgment dismissing the Complaint, the courts below held that petitioner was not engaged in maritime employment and thus was not covered by the LHWCA. As this Court noted in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979), the 1972 Amendments to the LHWCA replaced "the single-situs requirement with a two-part situs and status standard," *id.*, at 73, for determining whether a worker is covered by the LHWCA. Before a worker may avail himself of the benefits under the LHWCA he must prove not only that he was injured on a site as defined in § 3(a), 33 U.S.C. § 903(a), he must also prove that he was engaged in maritime employment pursuant to § 2(3), 33 U.S.C. § 902(3). The term "maritime employment" embodies "an occupational rather than a geographic concept." Id. at 79. Clearly, a worker may not claim coverage under the LHWCA simply because he is injured upon navigable waters. *See Fusco* v. *Perini North River Associates*, 601 F.2d 659 (2d Cir. 1979), *vacated and remanded*, 444 U.S. 1028 (1980), *on remand*, 622 F.2d 1111 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981). As this Court has recognized, the intent of Congress in creating the status requirement in 1972 is best served by focusing "upon the

nature, not the location, of employment" of a worker, even where it does not extend coverage to all workers in the situs area. *P.C. Pfeiffer Co.* v. *Ford, supra* at 83.

The courts below held that petitioner did not meet the status test of § 2(3), 33 U.S.C. § 902(3), only after reviewing petitioner's role at respondent Museum, the history and present status of the Peking and the purposes of respondent Museum and concluding that petitioner's activities did not bear a "significant relationship to navigation or to commerce over navigable waters." This standard, derived from *Executive Jet Aviation, Inc.* v. *City of Cleveland,* 409 U.S. 249 (1972) and first applied to a coverage question in *Weyerhaeuser Co.* v. *Gilmore,* 528 F.2d 957 (9th Cir. 1975), *cert. denied,* 429 U.S. 868 (1976), has been applied by various Circuit Courts of Appeal that have been presented with the issue of whether a worker was engaged in maritime employment within the meaning of § 2(3), 33 U.S.C. § 902(3). *See Churchill* v. *Perini North River Associates,* 652 F.2d 255, 256 n.1 (2d Cir. 1981) (per curiam), *cert. granted sub nom. Director, Office of Workers' Compensation Programs* v. *Perini,* 102 S. Ct. 1425 (1982); *Fusco* v. *Perini North River Associates, supra; Dravo Corp.* v. *Banks,* 567 F.2d 593, 595 (3rd Cir. 1977); *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs,* 540 F.2d 629 (3rd Cir. 1976); *Conti* v. *Norfolk & Western R. Co.,* 566 F.2d 890 (4th Cir. 1977); *Gilliam* v. *Wiley N. Jackson Co.,* 659 F.2d 54, 56 (5th Cir. 1980); *Hullinghorst Industries Inc.* v. *Carroll,* 650 F.2d 750, 756 (5th Cir. 1981), *cert. denied,* 102 S.Ct. 1037 (1982); *Mississippi Coast Marine, Inc.* v. *Bosarge,* 637 F.2d 994, 998 (5th Cir. 1981); *Odom Construction Co.* v. *Department of Labor,* 622 F.2d 110, 113 (5th Cir. 1980), *cert. denied,* 450 U.S. 966 (1981); *Duncanson-Harrelson Co.* v. *Director, Office of Workers' Compensation Programs,* 644 F.2d 827, 830 (9th Cir. 1981).

This standard is fully consonant with the holding of this Court in *P.C. Pfeiffer Co.* v. *Ford, supra.* Moreover, use of this standard insures that coverage under the LHWCA will not be extended to those workers whose employment is of a purely

local concern. Not all employment involving work upon navigable waters is maritime in nature, just as not all accidents upon navigable waters constitute maritime torts. In *Executive Jet Aviation, Inc.* v. *City of Cleveland, supra,* this Court held that for a tort to be a maritime one, there must be proof that "the wrong bear[s] a significant relationship to traditional maritime activity." *Id.* at 268. Most recently, this Court reaffirmed the holding of *Executive Jet* when it held that a collision between two pleasure boats caused by negligent operation of one of the boats bears a sufficient nexus to traditional maritime activity, *viz.* navigation upon navigable waters, as to constitute a maritime tort. *Foremost Insurance Co.* v. *Richardson,* 50 U.S. L.W. 4778 (June 23, 1982).

In amending the coverage provisions of the LHWCA in 1972, Congress obviously intended to limit coverage under the LHWCA to those workers involved in employment of a federal maritime nature where uniformity in interstate or foreign commerce is an important concern. A careful review of the record below demonstrates conclusively that petitioner's employment involved no federal maritime concerns. He was unquestionably an employee of a *bona fide* maritime museum. His duties were in the nature of general maintenance work about the Museum and did not have the goal of making the Peking or other similar museum artifacts seaworthy and fit for a return to maritime navigation and commerce. Indeed, the Peking had not been in active navigation for almost fifty years as of the time of petitioner's accident. Petitioner has never attempted to controvert these facts. Unquestionably, petitioner's activities did not have any realistic relationship to traditional maritime navigation or commerce.*

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* A bill that has recently been passed by the Senate makes clear the sense of Congress that workers such as petitioner are not within the coverage of the LHWCA. S. 1182, 97th Cong., 2d Sess., 128 Cong. Rec. S9202 (1982). Under this bill, the LHWCA would be amended to expressly exclude from coverage workers in questionable "maritime" lines of work, such as marina employees, grain elevator employees, restaurant employees, and maritime museum employees. As the Senate

Petitioner cites no authorities that apply a standard different from the "significant relationship to navigation or to commerce over navigable waters" standard relied upon by the courts below. In essence, petitioner does not challenge the use of this standard as much as he seeks a revision by this Court of the facts found and relied upon by the courts below. This, obviously, is not the purpose of seeking review by this Court.

None of the authorities cited in the Petition mandate an opposite conclusion. Neither *C.H. Northam,* 181 Fed. 983 (D. Mass. 1909) nor *Pleason* v. *Gulfport Shipping Corp.,* 221 F.2d 621 (5th Cir. 1955) involved the issue of coverage under the LHWCA. *Luna* v. *Star of India,* 356 F. Supp. 59 (S.D. Cal. 1973), while involving a museum artifact, simply held that the District Court had admiralty jurisdiction over an action brought by a non-employee of a maritime museum. *Luna* explicitly did not rule on any other question. *Id.* at 65. None of the other decisions cited in the Petition dealt with museum employees; they did no more than hold that coverage existed under the LHWCA on the particular facts of those cases. Given that the issue of whether there is coverage under the LHWCA turns on the facts of each case, these authorities avail petitioner little.

The holdings of the courts below that petitioner was not engaged in maritime employment within the meaning of § 2(3), 33 U.S.C. § 902(3), are amply supported by the record and are consonant with the decisions of this Court and of other Circuit Courts of Appeal.

While the LHWCA is generally construed liberally to afford compensation coverage, this Court seems to adopt a more restrictive approach where third-party litigation is involved. Thus, in *Bloomer* v. *Liberty Mutual Insurance Co.,* 445 U.S.

Report accompanying S.1182 notes, employers of such workers "lack the necessary nexus to maritime employment and commerce and therefore are properly exempted from the jurisdiction of the Act." S.Rep. No. 97-498, 97th Cong., 2nd Sess. at 30 (July 27, 1982).

74 (1980) this Court, ruling that an employer is not required to share litigation expenses incurred by an employee or to have its employee's recovery against the third party reduced by those litigation expenses, observed that compensation benefits were increased substantially by the amendments and then said, 445 U.S. at 83:

> These increases were linked to two provisions designed to reduce litigation and to insure that stevedores would have sufficient funds to pay the additional compensation.

The Court then mentioned the abolition of the *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946), unseaworthiness remedy and the limiting of the cause of action to negligence. Secondly, it noted the elimination of the *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), indemnity action against the employer.

This Court went on to say, 445 U.S. at 83-84:

> Indeed, there was considerable testimony during the hearings that third-party actions had resulted in congested courts and that the primary beneficiaries had been lawyers, and not injured longshoremen. The Senate Report stated:
>
> > '[t]he social cost of these lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in any real increase in actual benefits for injured workers.'
>
> The elimination of the shipowner's cause of action against the stevedore was intended to reduce litigation, immunize stevedores and their insurers from liability in third-party actions and assure conservation of stevedore resources for compensation awards to longshoremen.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that a Writ of Certiorari should not issue to review the decision below.

Respectfully submitted,

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